STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL ZARATE,

Defendant-Appellant.

UNPUBLISHED
November 16, 2001

No. 218477
Saginaw Circuit Court
LC No. 96-011841-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICANOR JAMES MURRAY,

Defendant-Appellant.

No. 218478
Saginaw Circuit Court
LC No. 96-011772-FC

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendants Miguel Zarate and Nicanor Murray appeal as of right from their convictions arising out of multiple sales of narcotics to an undercover police officer in 1995. In a joint trial, the jury convicted Zarate of conspiracy to either deliver or possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a, delivery of 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), possession with intent to deliver at least 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and delivery of at least fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). The jury convicted Murray of conspiracy to deliver or possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a, delivery of at least fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), delivery of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and four counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant Zarate was sentenced to life imprisonment for his convictions of conspiracy and delivery of 650 or more grams of cocaine, twenty to thirty years' imprisonment for possession with intent to deliver 225 or more but less than 650 grams of cocaine, and ten to twenty years' imprisonment

for delivery of less than fifty grams of cocaine, all sentences to be served consecutively. Defendant Murray was sentenced to life imprisonment for the conspiracy conviction, ten to twenty years' imprisonment for delivery of fifty or more but less than 250 grams of cocaine, two to four years' imprisonment for each of the marijuana-related convictions, and five to twenty years' imprisonment for each conviction involving delivery of less than fifty grams of cocaine, all sentences to be served consecutively. We affirm in part, reverse in part, and remand.

Both defendants argue that the police engaged in sentence entrapment by inducing them to sell increasing amounts of narcotics to the undercover officer. Defendants did not raise this issue below and, therefore, failed to preserve this issue for appellate review. *People v Elmore*, 94 Mich App 304, 308; 288 NW2d 416 (1979). Because defendants have not shown plain error affecting their substantial rights, they have forfeited this issue. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even assuming the viability of the defense of sentence entrapment, none occurred in this case. Neither defendant exhibited any hesitation in selling the increasing amounts of cocaine that were requested by the undercover officer, and the police delayed arresting defendants in an attempt to trace the narcotics further up the supply chain. *People v Ealy*, 222 Mich App 508, 511; 564 NW2d 168 (1997). The police did nothing more than present defendants with the opportunity to commit the crimes of which they were convicted. *Id*. See also *People v McGee*, ___ Mich App ___; ___ NW2d ___ (Docket No. 215576, issued August 31, 2001), slip op p 11. Because there is no merit to a claim of sentence entrapment, we conclude that Murray was not denied the effective assistance of counsel by his attorney's failure to raise this issue in the trial court. Counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Murray argues that there was insufficient evidence to support his conspiracy conviction. We review this issue de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), and view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We must show deference to the jury's verdict, drawing all reasonable inferences and making all credibility choices in support of that verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

We conclude that the prosecutor failed to present sufficient evidence to support Murray's conspiracy conviction. That conviction stemmed from the sale of approximately one kilogram of cocaine to an undercover officer. The undercover investigation, from its inception, targeted both Murray and Zarate—the plan was to request increasing amounts of narcotics to cut Murray out of the equation and deal directly with Zarate, who was perceived to be a larger-scale supplier. The investigation met this goal. Murray arranged for the undercover officer to buy two ounces of cocaine from Zarate on September 21, 1995. After that purchase, the police informant and undercover officer dealt exclusively with Zarate. On November 8, 1995, Zarate sold approximately one kilogram of cocaine to the undercover officer. Murray did not arrange this sale. Indeed, one officer involved in the investigation admitted during his testimony that Murray was not involved in the kilogram transaction. The government cannot have it both ways—it cannot seek to eliminate Murray from the kilogram transaction and then seek to convict him of conspiracy relating to that transaction.

The essence of a conspiracy is an agreement to commit an unlawful act. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974); *People v Weathersby*, 204 Mich App 98, 111; 514 NW2d 493 (1994). Although an agreement may be inferred from circumstantial evidence, *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991), "the circumstances must be within safe bounds of relevancy and be such as to warrant a fair inference of the ultimate facts." *People v Brynski*, 347 Mich 599, 605; 81 NW2d 374 (1957). Here, the prosecutor argues that Murray was part of an ongoing criminal enterprise with Zarate to sell narcotics. This, argues the prosecutor, was sufficient to convict Murray of conspiracy relating to the kilogram transaction, although there is no evidence tying him to that specific transaction. This is untenable. Although Murray's past drug dealings with Zarate are *relevant*, *People v Izarraras-Placante*, 246 Mich App 490, 493-494; ___ NW2d ___ (2001), they do not constitute *sufficient* evidence of Murray's guilt. A defendant may not be found guilty by association. *Brynski*, *supra* at 605. Rather, "[c]riminal guilt under our law is personal fault." *People v Sobczak*, 344 Mich 465, 470; 73 NW2d 921 (1955).

Here, the evidence that Murray previously engaged in drug trafficking, even on a continuing basis, did not constitute sufficient evidence that he conspired with Zarate with regard to the specific kilogram transaction. By his participation in *some* drug transactions with Zarate, Murray may not be convicted of conspiracy relating to *every* drug transaction that Zarate engaged in. Because the prosecutor failed to present sufficient evidence that Murray conspired with Zarate to deliver or possess with intent to deliver at least 650 grams of cocaine, the trial court erred by denying Murray's motion for a directed verdict. We vacate Murray's conspiracy conviction. The Double Jeopardy Clause prohibits retrial. US Const, Am V; *Burks v United States*, 437 US 1, 18; 98 S Ct 2141; 57 L Ed 2d 1 (1978); *People v Murphy*, 416 Mich 453, 467; 331 NW2d 152 (1982).

We also vacate Zarate's conspiracy conviction. There can be no conspiracy with only one person. *People v Anderson*, 418 Mich 31, 36; 340 NW2d 634 (1983). Where two defendants are tried together, an acquittal of one requires an acquittal of both. *Id*. at 36-37. Although Zarate does not raise this issue on appeal, we nonetheless reach it in the interests of justice. The right to be convicted only on sufficient evidence of guilt is central to our system of jurisprudence, and we cannot allow this conviction to stand on insufficient evidence. See also *People v Hayden*, 132 Mich App 273, 288 n 8; 348 NW2d 672 (1984) (this Court may choose to address issues raised by codefendants in consolidated cases, to avoid inconsistent results).

We also vacate Murray's conviction of delivery of at least fifty but less than 225 grams of cocaine. This conviction stemmed from a sale of "two ounces" of cocaine to the undercover officer on September 21, 1995. Murray arranged the sale, and was unquestionably guilty of delivery of cocaine. The only question is the quantity. Two ounces is slightly more than 56 grams, which is over the 50-gram threshold for the instant conviction. However, police officers discovered that the amount actually delivered was only 49.18 grams. Thus, Murray may only be convicted of delivery of less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv). Quantity is an element of a delivery offense. *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001).

The prosecutor argues that the 49.18 grams may be combined with 7.13 grams of cocaine that Zarate later delivered to a police informant, to make up for the shortage. However, the evidence showed that the police dealt only with Zarate in that transaction—there was no evidence that Murray was even aware of the seven-gram transaction. Thus, those amounts may

not be aggregated to support Murray's conviction. Therefore, we vacate Murray's conviction of delivery of at least fifty but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii). We remand for entry of conviction on the lesser offense of delivery of less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv).[1]

We find merit in one other issue in this case. Zarate claims that the trial court mistakenly believed that a life sentence was mandatory for Zarate's conviction of delivery of 650 or more grams of cocaine. MCL 333.7401(2)(a)(i). At the time that Zarate committed that crime, life imprisonment was the statutorily mandated penalty. However, the statute at the time of sentencing provided that the crime was "punishable by imprisonment for life or any term of years but not less than twenty years." *Id*. The prosecutor argues that the version in effect at the time of the commission of the offense should control. However, absent evidence of legislative intent otherwise, criminal defendants are entitled to be sentenced under an ameliorative amendment that became effective after the commission of the crime but before sentencing. *People v Schultz*, 435 Mich 517, 530-531; 460 NW2d 505 (1990); *People v Scarborough*, 189 Mich App 341, 343-345; 471 NW2d 567 (1991). Thus, the trial court was not required to impose life imprisonment. The trial court, when sentencing Murray on the same day, stated that it was imposing a life sentence for his conviction involving over 650 grams and that the court lacked discretion in the matter. This shows that, when sentencing Zarate on the same day, the court failed to exercise its discretion because of a mistaken belief of law. The appropriate remedy is to remand for resentencing. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). On remand, the trial court may sentence Zarate to imprisonment for life or any term of years, but at least twenty years.

We find no merit in the remaining issues raised by defendants.

First, Zarate has not shown plain error affecting substantial rights from the trial court's admission of hotel-registration cards into evidence. *Carines*, *supra* at 763. Although Zarate objected to this evidence, it was on other grounds than those asserted on appeal. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). The cards were admitted to show that Zarate had rented the room in which a large amount of cocaine was found. Although the probative value of the cards showing that Zarate had rented a room 88 times over an extended period was slight, it was not substantially outweighed by the danger of unfair prejudice. MRE 403. The prosecutor never argued that the cards proved that Zarate, who was from Chicago, was a drug dealer, and given Zarate's familial relationship with Murray, the evidence could be interpreted simply to show innocuous family visits. The evidence did not have "an undue tendency to move the tribunal to decide on an improper basis . . .." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

[1] We question the correctness of *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989), remanded on other grounds sub nom 439 Mich 896 (1991), in which this Court held that delivery of lesser amounts of cocaine are cognate lesser offenses of delivery of a greater amount. However, we need not address that decision, because we may remand for entry of conviction in this case, even if the lesser offense is considered cognate. There was sufficient evidence to support a conviction of the lesser offense, and we can unequivocally state that the jury's verdict must have included a specific finding that Murray participated in the 49 gram transaction. See *People v Bearss*, 463 Mich 623, 631-633; 625 NW2d 10 (2001).

Next, we conclude that Zarate was not prejudiced by the improper admission of coconspirator statements. The prosecutor presented two hearsay statements made by Murray to the effect that Zarate was his supplier. The prosecutor argues that these statements were made during the course of a conspiracy and in furtherance of it; therefore, they were admissible under MRE 801(d)(2)(E). However, independent proof of the conspiracy must be presented before coconspirator statements are admissible. *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). Here, the first statement was admitted before any evidence of a conspiracy was presented—therefore, it was inadmissible. However, the second statement was admitted later during trial, after the prosecutor had presented evidence that Murray and Zarate acted in concert to sell narcotics to an undercover officer. The second statement was admissible. Therefore, the first statement, which was substantially the same, was cumulative to the second, and Zarate has not shown any prejudice resulting from the admission of the first statement. In light of his failure to object to the first statement, Zarate has not shown plain error affecting his substantial rights. *Carines*, *supra* at 763.

We likewise conclude that Murray has not shown plain error resulting from the admission of hearsay statements of Zarate. *Id.* By the time the challenged statements were admitted, the prosecutor had presented independent evidence of a conspiracy. Thus, the statements were admissible under MRE 801(d)(2)(E).

Next, we reject Murray's claim that it was improper to allow a police officer to testify as an expert witness. This issue is also unpreserved, and Murray has failed to show plain error. *Carines*, *supra* at 763. The police officer testified, based on his experience, that the marijuana found in Murray's home was intended for delivery to others and not merely for personal use. This was proper testimony. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991).

Next, we reject Murray's claim that the trial court failed to instruct the jury properly that each verdict must be unanimous. Again, this issue is unpreserved, and Murray has failed to show plain error. *Carines*, *supra* at 763. A criminal defendant enjoys the right to a unanimous verdict. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). Here, the trial court instructed the jury to consider each charge separately, and it also instructed the jury that its verdict must be unanimous. These instructions sufficiently protected Murray's right to a unanimous verdict. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

Finally, Murray argues that the trial court erred by concluding that a statement Murray made to the police was admissible. We need not address the merits of whether the statement was admissible, because the statement was never, in fact, admitted into evidence. Although the trial court initially held that the statement was admissible, the prosecutor later advised the court and counsel that it was unclear whether Murray had invoked his right to remain silent. Therefore, the prosecutor chose not to offer the statement into evidence, notwithstanding the trial court's earlier ruling. The prosecutor acted admirably to seek not only a conviction, but also to preserve Murray's constitutional rights. In contrast, we are disturbed by the conduct of Murray's appellate counsel. After raising this issue in a motion for a new trial, counsel was informed by the trial court that the challenged statement was never admitted into evidence. Despite having been so advised (leaving aside that counsel should have known from a review of the record that the statement was never admitted), counsel again raised this issue on appeal—and failed to advise this Court that the challenged statement was never admitted into evidence. We remind

counsel of his duty of candor before this tribunal, MRPC 3.3(a)(1), and we admonish him to refrain from misrepresenting the factual record to this or any Court.

In Docket No. 218477, we vacate Zarate's conviction of conspiracy to deliver or possess with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i). We also remand for resentencing of his conviction of delivery of 650 grams or more of cocaine. MCL 333.7401(2)(a)(i). On remand, the trial court must exercise its discretion to sentence Zarate to life or any term of years, with a twenty year mandatory minimum. We affirm Zarate's remaining convictions.

In Docket No. 218478, we vacate Murray's conviction of conspiracy to deliver or to posses with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i). We also vacate his conviction of delivery of at least fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and remand for entry of conviction of the lesser offense of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). We affirm Murray's remaining convictions.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey